

July 20, 1999

MEMORANDUM

SUBJECT: Model Language for Interim Approval of TSCA 402/404 Lead-Based Paint Program in States that Have Inadequate Enforcement Authorities Due to Audit Privilege and Immunity Laws

TO: Regional Counsels

FROM: Nancy Stoner, Director \s\
Office of Planning and Policy Analysis

The regulations applicable to the lead-based paint program, often referred to as the TSCA 402/404 Abatement Rule, provide for an interim and final approval of the compliance and enforcement portion of the state or tribal lead-based paint activities program. The enforcement authority that a state or tribe must demonstrate to meet the requirements for interim approval is different than that necessary to meet final approval. To satisfy the requirements of interim approval, a state or tribe must demonstrate a level of compliance monitoring and enforcement necessary to ensure that the state addresses any significant risks posed by noncompliance with its lead-based paint activity requirements. To receive final approval, a state or tribe must be able to immediately implement full enforcement and information gathering authority, as well as be able to meet the performance elements of the program.

EPA's policy on granting interim approval to states with audit privilege and/or immunity laws that have not yet resolved federal authorization issues with EPA was documented in an August 21, 1998, memorandum from Steven Herman, Assistant Administrator, OECA, to Lynn Goldman, Assistant Administrator, OPPTS. The memorandum concluded that audit privilege and/or immunity laws may impair the state's ability to adequately enforce its lead based paint program. The memorandum proposed that EPA grant interim approval to those states with audit privilege and/or immunity laws that apply for authority to administer the lead-based paint program and meet the requirements for interim approval, but fail to meet the requirements for final approval because of an audit privilege and immunity law. In order to ensure consistency with EPA's Statement of Principles,¹ the following model language should be used in the Federal

¹ "Statement of Principles: Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs." memorandum from Steven A. Herman, Assistant

Register Notice for granting interim approval in any state that has an unresolved audit privilege and/or immunity law:

The State of ['s] environmental audit privilege and penalty immunity statute (codified at []) may impair the State's ability to fully administer and enforce the lead-based paint program. Interim compliance and enforcement approval will provide the State with the opportunity to address problems and issues associated with the State's environmental audit privilege and penalty immunity law as well as the development and implementation of required performance elements under 40 C.F.R. Part 745.327(c). EPA will work with the State during this interim approval period to remedy any deficiencies in its laws or implementation of the required performance elements. Interim approval of the compliance and enforcement program portion of the State's program may be granted only once. EPA's interim approval of the compliance and enforcement program portion of the State's program expires on [3 years from approval].

If the State does not meet the requirements for final approval of its compliance and enforcement program by the end of the three year period, EPA may be compelled to initiate the process to withdraw [State's] interim authorization pursuant to 40 C.F.R. § 745.324(i). If the State has made modifications to [the State Audit Law] necessary to meet the minimum requirements of its federally-authorized environmental programs, that law should no longer present a barrier to final approval of its lead-based paint activities program.

A list of states with audit privilege and immunity laws that have not yet resolved federal authorization issues with EPA is attached. Please note that certain states have resolved the deficiencies in their laws so that these laws no longer present barriers to final authorization of federal environmental programs.

Some states may have only privilege provisions or only immunity provisions in their law. Also, some states may choose to self-certify for interim approval. In these cases, the model language may require modifications. If your situation requires modifications to the model language, or if you have any questions, please call Van Housman of my staff at (202) 564-0143.

Administrator for Enforcement and Compliance Assurance, Robert Perciasepe, Assistant Administrator for Water, Mary Nichols, Assistant Administrator for Air and Radiation, and Timothy Fields, Acting Assistant Administrator for Solid Waste and Emergency Response, to Regional Administrator (February 14, 1997).

Attachment

cc: Audit Task Force
 Regional Lead Coordinators
 Lin Moos, OPPTS
 Clarence Lewis, OPPTS
 Traci Brown, OPPTS
 Shana Arnold, TPED
 Dwayne London, OGC